any part thereof. The respondent produced his rent receipt at the back of which appears one of the terms of the tenancy agreement which is as follows:—

"The tenant is not entitled to sublet the premises without the written consent of the owner".

In the event, the learned president made an order giving possession of the said part to the respondent.

The appellant then applied to the learned president to set aside the default judgment on the grounds set out in her affidavit dated 19th December, 1964, namely, that she was ill on the day of the hearing of the summons, and further, that she had a good defence on the merits. It is not in dispute that this was a regular judgment. The principles by which the court should be guided in setting aside a default judgment are laid down in the case of *Evans* v. *Bartlam*,[1] where Lord Atkin said at page 480:—

"The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence.

. . . . . .

The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure".

The learned president, however, refused to set aside the judgment on the ground that "besides failing to file a statement of defence, the applicant has no defence to contest the claim". The fact that the appellant had failed to file a defence is not, in my view, wholly relevant to an application to set aside a default judgment. However, in coming to the conclusion that the appellant had "no defence to contest the claim", it would appear from his grounds of judgment that the learned president only took into consideration an exhibit to the appellant's affidavit, a document relating to the grant of the sub-tenancy of the said part and a rent receipt produced by the respondent purporting to contain the prohibition against the subletting of the premises. This, in my view, is a wrong approach, due to insufficient appreciation of the principle that in an application to set aside a default judgment the learned president had to consider if the applicant had disclosed a defence on the merits, that is, if she had a *prima facie* defence.

It is clear from the appellant's affidavit that she was taking the position that the former tenant, Kow Guan, had sublet the said premises to her in 1954 some years before the respondent took ejectment proceedings against him. She also claimed that the tenancy agreement between the respondent and Kow Guan did not preclude subletting and, in the alternative, that it did not prohibit subletting of part of the premises. She had therefore disclosed an issue to be tried. There was no counter-affidavit by the respondent. Even if there had been one, I do not see why at this stage the appellant should not be believed. As Lord Wright said in the case cited above, "The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits".

In the result, I set aside the default judgment and order the case to be tried by a different president. The defence is to be filed within fourteen days of the date hereof. As a term for setting aside the default judgment, the appellant has to deposit a sum of $1,000 in court. The costs thrown away are to be paid to the respondent.

Appeal allowed.

Solicitors: *Joseph & Son; Sault, Keith Sellar & Co.*

C.C. LOKE v. S.H. BENSON (SINGAPORE) LTD.

[O.C.J. (Winslow J.) July 23, 1966]

[Singapore — District Court Appeal No. 4 of 1966]

Bailment — Action for wrongful detention of furniture — Counterclaim for storage rent.

The appellant occupied a flat at River Valley Road. In May 1963 he allowed *W.* an employee of the respondent company to use one bedroom and to share the expenses of the flat. The company supplied bedroom furniture for the use of *W.* *W.* moved out of the flat in August 1963 leaving the bedroom furniture behind. The appellant then made several telephone calls to the company to ask that the furniture be removed but nothing was done till January 1964 when the secretary of the company wrote to the appellant saying that the company would like to come to an amicable arrangement with him. Later the secretary saw the appellant and asked the appellant whether he would like to take the furniture for $100, which was considerably below its then market value. The appellant did not accept the offer and asked the secretary to have the furniture removed on payment of "storage rent". The appellant subsequently refused to allow the company to collect the furniture unless he was paid rent or compensation. The company thereupon issued a writ claiming the return of the furniture. The appellant counterclaimed for storage rent at $70 a month from September 1963 until judgment but did not specifically plead any lien. At the trial counsel for the appellant conceded that the company was entitled to recover the furniture. The learned district judge allowed the appellant the sum of $350 for storage rent and also assessed the damages for wrongful detention at $25 a month from February 6, 1964 till judgment, that is $525. The appellant appealed against the award of damages and the respondents counter-appealed against the award of storage rent.

Held: (1) there was no agreement in this case that any sum should be paid for storage charges and that the furniture should not be removed until such sum has

been paid and therefore the learned district judge was correct in holding that the refusal by the appellant to return the furniture was wrongful and that he was liable for its detention;

(2) the damages awarded were in the circumstances excessive and that there should be an award of nominal damages of $50;

(3) the appellant is not entitled to any storage rent, as there was no agreement for the payment of any such rent.

Cases referred to:—

(1) *Andrews* v. *Home Flats Ltd.* [1945] 2 All E.R. 698.

(2) *Gray* v. *Chamberlain* (1830), 172 E.R. 696.

(3) *Sachs* v. *Miklos* [1948] 2 K.B. 23 at p. 37.

(4) *Nicholson* v. *Chapman* (1793), 126 E.R. 536.

DISTRICT COURT APPEAL.

P. Coomaraswamy for the appellant.

Tang See Chim for the respondent.

Cur. Adv. Vult.

Winslow J.: The appellant is dissatisfied with that part of the judgment of the learned district judge which ordered the payment by him of the sum of $525 as damages for wrongful detention of certain items of bed-room furniture belonging to the respondents, Messrs. S. H. Benson (Singapore) Ltd. (hereinafter referred to as "the company") over and above an order that he should return this furniture. The damages were computed on the basis of a loss of $25 per month (as "hire value" which the furniture was said to possess) spread over a period of 21 months from its detention on 6th February, 1964 to the date of judgment i.e. 19th November, 1965.

The undisputed facts are as follows:—

(a) In 1963 the appellant occupied a flat at No. 541-A River Valley Road and in May of the same year he allowed a certain Mr. Ward, an employee of the company, to use one bed-room and to share the expenses of maintaining the flat with him on a 50/50 basis. The company supplied bed-room furniture for the use of Mr. Ward. Mr. Ward, however, moved out on transfer to Kuala Lumpur in August, 1963, leaving the bed-room furniture behind after having paid his share of the expenses for the whole of August.

(b) Early in September, 1963 the appellant telephoned Mr. Carrington, the accounts manager of the company, informing him that he wanted the furniture removed and asking him to arrange for its removal. Mr. Carrington passed on this information to the secretary of the company.

(c) It appears that the appellant made a number of telephone calls on subsequent occasions repeating this request but nothing was done by the company about the furniture until late in January, 1964 when Mr. Partington, director and secretary of the company, wrote two letters to the appellant saying that the company would like to come to an amicable arrangement concerning the furniture either by selling it to the appellant or arranging for its collection. No reply was received to these letters because the appellant was ill at that time. Mr. Partington eventually made a personal visit to the appellant at his office on 6th February, 1964. A discussion took place between them which commenced amicably, in the course of which Mr. Partington asked the appellant whether he would like to take over the furniture for $100, although this was considerably below its then market value. The appellant did not accept the offer and asked Mr. Partington to have the furniture removed on payment to him of "storage rent" as he had been unable to rent out the flat which he could have done, if it had been vacant, at between $80 - $100 per month. The discussion which had, as I have said earlier, commenced amicably, ended in heat with Mr. Partington banging on the table and refusing to comply with the request for "storage rent" or compensation.

(d) In short, the appellant refused to allow the company to collect the furniture unless he was paid rent or compensation for the inconvenience caused to him by the earlier non-removal of the furniture between September, 1963 and February, 1964, a period of approximately 5 months, during which he had been unable to rent out the room.

(e) The company placed the matter in the hands of its solicitors who wrote to the appellant on 19th February, 1964, asking for a convenient date and time at which the furniture could be removed. The appellant, through his solicitors, replied to the company's solicitors on 3rd March, 1964 stating that the appellant would not allow the furniture to be removed unless he was paid at the rate of $70 per month for "storage rent" of the furniture until the date of its removal. The company accordingly issued the writ herein on 11th May, 1964 for recovery of its furniture which it claimed the appellant had refused to return and also for costs.

The appellant joined issue with the company on its statement of claim and counter-claimed for storage rent at $70 per month from September, 1963 until judgment or removal. It should be noted that no lien was specifically pleaded.

At the trial, the company was allowed, on 28th October, 1965, to amend its claim by adding a belated claim for damages for detention. This was no doubt prompted by the counter-claim but no reply was filed to the counter-claim.

At the concluding stages of the trial counsel for the appellant conceded that the company was entitled to recover its furniture. It is unfortunate that he did not so concede when he wrote his letter of 3rd March, 1964, conveying his client's regrets that he could not allow the furniture to be removed until storage rent was paid.

On the counter-claim the learned district judge allowed the appellant the sum of $350 for storage rent from September, 1963 until February, 1964.

He assessed the damages for wrongful detention by the appellant at $25 per month from 6th February, 1964 till judgment i.e. $525.

The net result of his judgment is that the company gets its furniture back and makes a gain of $175 on the transaction as a whole. There was no order as to costs.

The questions which, therefore, arise for determination on this appeal are:—

(1) Whether the damages awarded for the alleged

wrongful detention of the company's furniture were justified and, if so, whether the quantum thereof should be varied;

(2) whether the cross-appeal by the company against the award made on the appellant's counter-claim for storage charges and loss of rent caused by the company's failure to remove its furniture and assessed at $350 should succeed.

These questions are inter-twined in the sense, at least, that they both revolve around one issue i.e. whether there was an understanding between the parties on or before 6th February, 1964 that a reasonable sum would be paid by the company for storage charges etc. and that the furniture should not be removed until such a sum had been paid. It is clear from the evidence of the appellant that there was, in fact, no express agreement to that effect with the company as he himself said that he never thought of storage rent until 6th February, 1964 and that there was no agreement either with Mr. Ward or the company that storage rent would be paid. He further went on to say that although he was not interested in the financial aspects of the case he wanted repayment because of the way in which he had been treated. He said that the company had approached him with a view to settling the matter but at the meeting with Mr. Partington on 6th February, 1964 the latter had banged the table and refused to compensate him.

However, at this meeting in the appellant's office Mr. Partington did, in fact, offer the furniture to him for $100. Having regard to the fact that the furniture was valued at $500 (although at the date of trial in November, 1965 the accountant attached to the company valued it at $250) it seems to me that, in making this offer to the appellant, Mr. Partington may have taken into account some element of moral obligation at least on the part of the company to compensate the appellant for the inconvenience caused to him by his having had to keep the furniture in his flat in circumstances whereby he was unable to let out the room in which it was stored. The appellant did not want to be burdened with the furniture; he preferred money instead, although he was not particularly interested in it as such. This method of settlement did not commend itself to Mr. Partington who preferred a settlement which would not burden the company with furniture for which it had no further use. From the record it does not appear that the company deals in furniture or that it required the furniture then for any particular purpose. It had shown considerable indifference to the fate of this furniture until the latter part of January, 1964 without any consideration for the appellant's anxiety to be rid of the responsibility which had been imposed on him without any volition on his part by Mr. Ward's sudden departure. Mr. Partington, however, gave no evidence. When he offered the furniture at the ridiculously low figure of $100 to the appellant the company stood to lose at least $150 (taking the valuation given at the trial of $250) though it may have been worth more in February, 1964. The offer was not, however, accepted. Had the offer been accepted these proceedings would never have arisen and the appellant could well have re-sold the furniture and made a profit on the "deal" which should have been his sufficient reward.

A responsible business concern allowed its furniture to remain in the flat occupied by the appellant without making the slightest effort to remove it or to assume any responsibility for it for about 5 months. If the furniture had been stolen or destroyed during that period interesting questions would have arisen as to the duty owed towards it by both the company and the appellant which I do not now have to decide as the furniture is all in one piece, or, should I say, several pieces which are available for return.

As counsel for both the appellant and the company agreed, the law relating to bailment is such that little help can be derived from decided cases in English law, many of which turn on the question of the degree of care owed by bailees towards the property bailed. It would seem that this branch of the law is not only complex but shrouded in such a veil of mystery and uncertainty in its common law development as to require recourse to Roman law in order to unravel these mysteries and uncertainties.

I do not, however, propose to embark on an academic exercise which may be totally disproportionate to the demands of the present case, which can, I think, be resolved by an understanding of the established cases, as we know them through the existing reports, however inconclusive, divergent or depressing they may appear to be to those who seek a clear-cut answer.

In the endeavour to extract principles from the few decided cases which may be of assistance in resolving the difficulties posed in the current appeal, it should be borne in mind that there is no case which is on all fours with the present one.

It is not one which can be resolved by recourse to any custom or trade usage because the appellant is clearly not a wharfinger, carrier or store-house keeper, etc. Such persons have sometimes been held to occupy a special position both with regard to storage charges as well as their right to a lien which may entitle them to detain goods until payment thereof in terms of a reasonable sum, at least, in the absence of an agreement, for such storage.

The appellant is, in my opinion, not within that class of persons although an effort was made, on the authority of *Andrews* v. *Home Flats Ltd.*[1] and *Gray* v. *Chamberlain*,[2] to equate him with them in an attempt to bolster his

claim for storage charges and a lien over the property sufficient to justify his detention thereof in the absence of payment.

In these two cases the bailees of the property concerned were landlords who stored such property in the course of their business as landlords of flats and wine-cellars respectively. They were held to be custodians for reward even though no direct payment was received from the bailor (who was the wife of a tenant) in the first case and no specific amount was agreed as to storage charges in the second.

The second case, *Gray* v. *Chamberlain, supra,* was also relied upon to support a lien for storage charges. The jury found, on the direction given by Tindal C.J. that although no express bargain was made as to storage rent there was, in fact, a lien for a reasonable amount because they found that there was a contract and understanding between the parties, when the wine in question was put into the cellar, that it should not be moved until a reasonable sum had been tendered.

In the present appeal, there was admittedly no such contract or understanding and it is difficult to hold that a lien was acquired by the appellant. If he had been a store-keeper he could have relied on custom or trade usage for the acquisition of an implied agreement to pay a reasonable sum. I have carefully considered the authorities but can find none to support the creation of a lien in his case.

As *Paton* says in Bailment in the Common Law at page 187 —

> ". . . the modern theory is that a lien at common law arises only when the bailee has expended labour and skill in the improvement of the chattel. The custodian does not add value to the *res*.
>
> Liens, therefore, can arise in the case of custody only by (a) statute; (b) agreement specific or implied; (c) by the usage of the particular trade. This last case is really an example of the second, since evidence of usage is effective only as showing the implied basis of the contract".

The acquisition of a lien, it should be noted, is here considered in relation to the position of custodians for reward.

If, as I hold, the appellant has not succeeded in proving that he is a custodian for reward, no lien can ever be implied.

As *Paton* asks in despair, with regard to involuntary bailees (and I think the same sentiments apply to deposits), at page 115 of the same work —

> "If someone leaves a grand piano at my house by mistake, I cannot be bound to pay for its return. The reasonable thing is to notify the owner, but if he neglects to call for it, how long must I provide it storage space?".

Having posed the question, like Pontius Pilate, he received no answer — from any of the available authorities.

Lord Goddard suggested in *Sachs* v. *Miklos* [3] that if a gratuitous bailee writes to a bailor telling him that he no longer wishes to hold the property and asks him to remove it and the bailor, after being told that the property will be sold if it is not removed, does nothing about the matter, then a court may *possibly* infer that the bailor was impliedly consenting to the sale (the italics are mine). He pointed out, however, that mere silence on the part of the bailor may not amount to consent.

One has considerable sympathy for the position in which private persons situated like the appellant may find themselves. Property is forced upon them which they are unwilling to keep and which the owners are slow to remove. Lawyers seem to be still undecided as to what remedy they can have in the absence of agreement or usage. Such people get no benefit at all out of this kind of gratuitous bailment or deposit. The bailor is benefitted but is not liable to pay the bailee anything if he does not agree to do so unless the bailee belongs to the class of persons I have mentioned who, by virtue of trade, custom or usage, are in a special position. It is only where he has expended labour and skill in the improvement of the property that the law gives him a lien. Mere maintenance does not. In *Nicholson* v. *Chapman,* [4] a "good Samaritan" who protected timber belonging to a stranger which was in danger of being washed away was held to have no lien for his expenses.

I have reluctantly come to the conclusion that the learned district judge was correct in his decision that the refusal by the appellant to return the furniture was wrongful and that he was liable for its detention.

I am not satisfied, however, in the absence of any evidence as to the nature and extent of any damage through deprivation suffered by the company, that the quantum of damages in the sum of $525 is justified. It is most excessive having regard to the further fact that Mr. Partington had himself offered to sell the furniture for $100 to the appellant. In the circumstances nominal damages in the sum of $50 should suffice especially when there is no question about the company's not getting its furniture back intact.

The cross-appeal against the award of $350 to the appellant for storage rent succeeds, unfortunately, for the reason that there was no agreement for the payment of a specific rent nor is there any usage applicable to the facts of this case which entitles the appellant to be paid a reasonable sum. The learned district judge was moreover wrong in drawing an analogy with a seller in possession of goods on the purchaser's failure to take delivery after sale.

I should like to add, in conclusion, having regard to the unsatisfactory state of the law regarding situation of this kind, that I adopt wholeheartedly and with great respect the moral stated by Lord Goddard in *Sachs* v. *Miklos* above at page 34 as follows:—

"This action appears to be a warning against doing a friendly act. Its moral is: never do anything for anybody when asked without going to solicitors and having a formal agreement drawn up".

The appeal, therefore, succeeds to the extent that the quantum of damages for detention of the furniture is varied from $525 to $50.

The cross-appeal succeeds.

Order accordingly.

Solicitors: *Braddell Bros.; Rodyk & Davidson.*

UNITED INVESTMENT AND FINANCE LTD. v. WALKER & ANOR.

[O.C.J. (Winslow J.) July 23, 1966]

[Singapore — Suit No. 1735 of 1963]

Hire purchase — Whether transaction a genuine hire purchase or a money loan disguised under the cloak of a hire purchase — Liability of guarantor.

The first defendant desired to buy a motor cycle and he obtained one from the second defendant, who was a dealer in motor cycles. The second defendant collected a deposit from the first defendant and asked him to complete a proposal form and other documents, which were later forwarded to the plaintiffs in order that they could conclude a hire purchase agreement with the customer, the first defendant, who would thereby became a hirer. No formal agreement in writing was made evidencing a sale from the second defendant to the plaintiffs but evidence was given by the managing director of the plaintiffs that there was an arrangement between his company and the second defendant whereby if any customer wished to buy a motor cycle on hire purchase the second defendant would sell the motor cycle to the plaintiffs and the plaintiffs would let it on hire purchase terms to the customer. The first defendant having defaulted the plaintiffs sued the second defendant, who were the guarantors.

Held: the transaction in this case was a hire purchase of the motor cycle by the plaintiffs to the first defendant and therefore the second defendant was liable as guarantor.

Cases referred to:—

(1) *United Investment and Finance Ltd.* v. *Abdul Rahman & Anor.* [1966] 2 M.L.J. 9.

(2) *Transport and General Credit Corporation Ltd.* v. *Morgan* [1939] 1 Ch. 531.

CIVIL SUIT.

S. Santhiran for the plaintiffs.

John Pillai for the second defendant.

Cur. Adv. Vult.

Winslow J.: The plaintiffs' claim in this action is similar to a claim they made in *United Investment & Finance Ltd.* v. *Abdul Rahman & Anor.*[1] against the same second defendant who was the guarantor of a hirer under a hire-purchase agreement with the plaintiffs in respect of a motor-cycle. The hirer in the present case was one R. W. Walker. In *Abdul Rahman's* case I decided on the evidence before me to dismiss the plaintiffs' claim on the ground that the hire-purchase agreement in question was merely a device to provide financial accommodation in the form of a money loan disguised under the cloak of a hire-purchase agreement and that the plaintiffs were not, in fact, the owners of the motor-cycle at the time when the agreement was concluded. The evidence, moreover, showed that the second defendant sold the motor-cycle in question to a person who subsequently negotiated the hire-purchase agreement with the plaintiffs. In that case too an initial deposit was paid to the second defendant and credit for this was given to the hirer in the hire-purchase agreement.

In three-cornered transactions of this kind (i.e. as between a financier such as the plaintiffs, a dealer such as the second defendant and a hirer such as R. W. Walker in this case) it is the recognised practice in commercial circles for the dealer to complete a proposal form after a customer has selected the goods he desires to acquire — in this case a motor-cycle — to collect a deposit from the customer which he retains and then to forward the proposal form together with a number of other documents duly signed by the customer to the financier in order that the financier can conclude a hire-purchase agreement with the customer who would thereby become a hirer. It is usual in these cases to have a separate agreement of some kind or a document evidencing the fact that a sale of the goods had taken place as between the dealer and the financier so as to vest the property in the goods in the financier before it becomes the subject-matter of a hire-purchase agreement.

In the case before me all the requirements followed by the commercial community in matters of hire-purchase have been followed save that there is no formal agreement in writing evidencing a sale from the dealer to the financier. It would appear from *Goode* on Hire-Purchase Law and Practice at page 376 that the sale to the financier is usually subject to the provisions of a master agreement between the financier and the dealer regulating the business connection between them. It does not seem that such an agreement is essential though it would seem to be highly desirable. It is a separate contract from the hire-purchase agreement and regulates the business relationship between dealer and financier at its inception. In the present case Mr. James Lim Hock Guan, the managing director of the plaintiffs in 1962 when the company was formed, gave evidence to the effect that at the commencement of business of the